

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DARLA E. COOK)	
Claimant)	
)	
VS.)	
)	
AGCO)	
Respondent)	Docket No. 1,011,684
)	
AND)	
)	
AMERICAN ZURICH INS. CO.)	
Insurance Carrier)	

ORDER

Respondent requested review of the January 30, 2006, Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on May 9, 2006.

APPEARANCES

Garry L. Howard, of Wichita, Kansas, appeared for the claimant. Larry D. Shoaf, of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for additional temporary total disability (TTD) benefits for the period from April 1, 2005, through April 24, 2005. The ALJ found that claimant had a 9 percent functional impairment and that claimant was entitled to a work disability in the amount of 48.75 percent from May 1, 2005, through August 30, 2005, and in the amount of 40.5 percent from and after September 1, 2005.

The respondent and its insurance carrier (respondent) contend that claimant should be limited to a functional impairment of 7 percent based on the opinion of Dr. Philip Mills. Respondent also claims that if claimant is entitled to an award based on work disability, then her task loss should be reduced to no more than 9.23 percent based on the opinion of Dr. J. Mark Melhorn and the task list of Dan Zumalt.

The claimant requests that the ALJ's Award be affirmed in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant had been involved in a motor vehicle accident in May 1997, before she began her employment with respondent. As a result of that accident she had injuries to her cervical spine which necessitated surgery to fuse her spine at C5-6 in November 1997. In December 1999, she underwent arthroscopic surgery on her right shoulder. She complained of pain in her right shoulder to her personal physician as late as February and March of 2003 and had been taking Lortab, Vicodin and Valium.

Claimant started working at respondent on November 27, 2000. Beginning in January 2003, she started working a spring machine. On June 17, 2003, after running approximately 30 35-pound springs, claimant noticed her left shoulder was swollen. She then looked down at her left arm and noticed swelling in her left arm through her forearm. She immediately reported the injury to the safety ambassador in her area and was sent to the medical/security department of respondent. The next day, she was moved to the blow motors area. This was a very physical job which required her to use wrenches and do overhead work. She claims that soon after she was moved to the blow motors area, she began having pain in her right shoulder and arm.

When she complained to respondent about her symptoms, it was suggested she see Dr. Kris Lewonowski, who had performed her previous cervical spine fusion. However, Dr. Lewonowski was not available, and claimant states she then received permission from respondent to see her personal physician, Dr. Jeffrey Reiswig. She saw Dr. Reiswig on July 1, 2003, at which time she complained of left shoulder pain and pain in both her right and left elbows. Dr. Reiswig put her on light duty work. Claimant was then given a job painting at respondent. On July 8, 2003, claimant returned to Dr. Reiswig, and he took her off work.

Dr. Reiswig referred her to Dr. Lewonowski. She complained to Dr. Lewonowski of having pain from the top of her head to her toes. She specifically complained of neck pain and pain in both shoulders and elbows radiating down into both arms. However, respondent would not authorize Dr. Lewonowski. After a preliminary hearing, respondent

authorized Dr. Anthony Pollock to be claimant's authorized treating physician. Dr. Pollock ordered MRI's of both her right and left shoulder, which was done on October 16, 2003. The left shoulder MRI revealed an irregular appearance of the superior margins of the supraspinatus muscle anteriorly, suggesting that it was partially torn or frayed. It also showed hypertrophy of the acromioclavicular joint with impingement. The MRI of the right shoulder showed a small area of altered signal within the supraspinatus muscle probably related to tendinosis and hypertrophy of the acromioclavicular joint but no significant impingement of the supraspinatus muscle.

Another preliminary hearing was held on January 8, 2004, at which time Drs. Lewonowski and Prohaska were designated as authorized treating physicians. Dr. Prohaska declined to treat claimant, and Dr. J. Mark Melhorn was then designated as an authorized treating physician. Claimant first saw Dr. Melhorn on March 25, 2004. She was still complaining of pain in her upper extremities.

Claimant was finally sent to Dr. George Fluter for treatment. She first saw Dr. Fluter on June 16, 2004, complaining of a shooting, stabbing and burning pain in both shoulders. Dr. Fluter ordered physical therapy and put her on anti-inflammatory and pain medication. An epidural steroid injection was performed on July 1, 2004, which did not relieve claimant's pain. On April 11, 2005, Dr. Fluter found that claimant was at maximum medical improvement (MMI) and released her to return to work as of April 25, 2005, with permanent restrictions.

Claimant returned to respondent on April 12, 2005, with the restrictions from Dr. Fluter. Respondent determined that it was not able to accommodate her restrictions, and she was terminated.

Claimant was seen by Dr. Philip Mills on February 9, 2005. Dr. Mills found her to be at MMI. Upon receipt of Dr. Mills' report by respondent, claimant's TTD was stopped as of March 31, 2005.

Claimant testified at the Regular Hearing that she had been looking for employment by submitting résumés and filling out applications. She had been working with Job Service in an effort to find a job and was sure she would be able to find a job within her restrictions. On September 1, 2005, claimant became employed at NCH Truck Service. She testified in a deposition taken October 3, 2005, that she earns \$8 per hour and works from 8 a.m. to 5:30 p.m. Monday through Friday, with a 30-minute lunch, which is nine hours per day Monday through Friday. In addition, she sometimes works four hours on Saturdays. During the four-week period that she worked at NCH Truck Service before her deposition was taken, she had worked two Saturdays. The job offers no pension plan or health plan, but she is paid time and a half for overtime. Assuming five hours of overtime Monday through Friday and four hours overtime for Saturday, the ALJ computed claimant's gross average weekly wage (AWW) for this job as \$320 base wage with \$108 in overtime, or \$428.

Dr. J. Mark Melhorn is a board certified orthopedic surgeon who specializes in conditions of the hand and upper extremities. He first began treating claimant on March 25, 2004, at which time her chief complaint was painful bilateral shoulders. After examining claimant and taking a history, Dr. Melhorn diagnosed her with right and left shoulder osteoarthritis AC joint, painful right and left shoulders, impingement versus possible partial tear, a C5-6 fusion, and degenerative changes in the C6-7 area. Dr. Melhorn treated claimant conservatively with exercise and a modification of her medication. In reviewing an MRI done on October 16, 2003, he did not find her a candidate for surgery. Dr. Melhorn saw claimant again on April 12, 2004, at which time he put her on light medium to medium work with task rotation, limit hand over shoulder with regard to right and left. Light medium is defined as 35-pound maximum lift and carry, 20 pounds frequently.

On April 26, 2004, Dr. Melhorn released claimant from treatment with restrictions of a medium work with task rotation, which consisted of a 50-pound weight restriction maximum, 25 pounds frequently, with task rotation. He stated he made this change from his April 12, 2004, recommendation because of the lack of change in her subjective complaints to the medical management that had been provided. Her examination was unchanged or perhaps slightly improved during that time period. Dr. Melhorn opined that claimant's next step would be to see a physiatrist for an assessment of her muscle aches and pains.

Dr. Melhorn last saw claimant on August 30, 2005, at the request of the respondent. He completed a full history, reviewed records and x-rays, and examined claimant. He discussed with claimant that although she had been off work since July 8, 2003, her symptoms have persisted, which would indicate that her current muscle pain is multifactorial in nature and represents a contribution of individual risk factors and possible workplace factors.

Dr. Melhorn reviewed a task list prepared by Dan Zumalt. Dr. Melhorn marked the list with yes for those activities that claimant could perform, no for those activities that claimant could not perform, and plus minus for those activities claimant may not be able to perform, may be able to perform but not in combination with other activities, or that he had insufficient information to render an opinion.

In using the list generated by the claimant alone, Dr. Melhorn opined that claimant was able to perform 37 tasks, was not able to perform 1 task, and there were 7 plus minuses. Using Dr. Melhorn's computation of dividing the plus minus tasks, 3.5 tasks would be added to the yeses and nos. In the Award, the ALJ rounded this up to 4 tasks, making 41 tasks claimant could perform and 5 tasks claimant could not perform. This calculates to a task loss of 11 percent.

In using the list supplemented by respondent, Dr. Melhorn opined that claimant was able to perform 42 tasks with 3 plus minus tasks. Using Dr. Melhorn's method of

computation, this would calculate to 42.5 tasks claimant could perform and 1.5 she could not perform. Rounding the 1.5 tasks to 2, this computes to a task loss of 4 percent.

Dr. George Flutter is a physiatrist and is board certified in physical medicine and rehabilitation. His current practice is in pain management. He first examined claimant on June 16, 2004. Claimant complained of a shooting, stabbing, and burning pain in both shoulders. She also had numbness in both hands. The pain was intermittent, worse in the evenings and at night. On examination, he found that her bilateral shoulder range of motion was limited in all planes. He diagnosed her with neck, shoulder, and arm pain; bilateral hand numbness; bilateral acromioclavicular joint hypertrophy with findings suggesting impingement; and fraying and/or tearing of the left rotator cuff. He recommended anti-inflammatory medicine and physical therapy.

Dr. Flutter saw claimant again on June 30, 2004, at which time he opined that because of claimant's history of neck fusion and degenerative changes in her cervical spine, there might be a component of cervical radiculopathy. He recommended a cervical epidural injection, which was performed on July 8, 2004, without much benefit.

Dr. Flutter last saw claimant on April 11, 2005. At that time, Dr. Flutter believed that she had reached MMI but would need to continue on medications on a long-term basis, which would need to be monitored. He also recommended permanent restrictions. He stated that he felt claimant was at a physical demand level of sedentary and should avoid activities at or above shoulder level or beyond 18 inches away from the body with her arms. She should not hold her head and neck in static, awkward, or extreme positions. Although he found her stable, she still had soreness and tenderness in the muscles of the neck and upper shoulders. Dr. Flutter opined that there was a causal connection between claimant's injury at respondent and the restrictions he recommended.

Based on the AMA *Guides*¹, Dr. Flutter rated claimant at a 5 percent impairment of function in each shoulder, which converts to a 6 percent whole body impairment. He also rated claimant with a 5 percent impairment of function to the body as a whole for myofascial pain. These ratings were combined, and Dr. Flutter opined that claimant had an 11 percent whole body permanent partial impairment as a direct result of her on-the-job injury in June 2003.

Dr. Flutter reviewed a task list prepared by Jerry Hardin. There were 42 unduplicated items on the task list, of which Dr. Flutter opined claimant could not perform 28. Therefore, Dr. Flutter's computed claimant's percentage of task loss to be 67 percent.

¹American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Philip R. Mills is board certified in physical medicine and rehabilitation. He examined claimant at the request of respondent on February 9, 2005. During that examination, he took a history, reviewed medical records, made a pain status inventory, and performed a physical examination. In his examination, he found a minimally decreased range of motion of the shoulders. Claimant complained of more pain on the right than on the left.

Dr. Mills diagnosed claimant with myofascial type pain in the shoulder girdle region bilaterally, possible shoulder impingement syndrome, chronic pain syndrome, and degenerative disc disease one level below her fusion site. He opined that claimant's myofascial pain syndrome appeared to be causally related to the work activity she was doing and was complicated by the possible shoulder impingement syndrome.

Dr. Mills reviewed the task list prepared by Dan Zumalt. On the list created with only claimant's input, Dr. Mills opined that claimant was unable to perform 6 of 45 unduplicated tasks on the list for a task loss of 13 percent. Upon reviewing the list with respondent's notations, Dr. Mills opined that claimant was unable to perform 3 of the 45 tasks for a 7 percent task loss.

Dr. Mills did not put any weight restrictions on claimant. His only work restrictions were to avoid repetitious or prolonged overhead work and reach and to avoid repetitious or prolonged neck hyperextension.

Using the *AMA Guides*, Dr. Mills found claimant had a 5 percent permanent partial impairment to each upper extremity as a result of loss of range of motion, which is a 3 percent permanent partial impairment to the whole body for each upper extremity. In addition, he found claimant had an additional 1 percent impairment for the myofascial pain syndrome. Using the Combined Values Chart, Dr. Mills rated claimant as having a 7 percent permanent partial impairment to the whole body.

Jerry Hardin, a human resource consultant, visited with claimant at the request of her attorney on May 11, 2005. From the information given to him by claimant, he prepared a task list for the jobs she held for the 15-year period before her work-related accident.

Because claimant was not working at the time she was interviewed by Mr. Hardin, he computed her actual wage loss as 100 percent. However, when looking at jobs available to claimant in the area she lived and in the Wichita market, he opined that, staying within her restrictions and considering her educational level, claimant had the ability to earn \$300 per week. Using an average weekly wage of \$778.67, this would compute to a wage loss of 61 percent.

Dan Zumalt interviewed claimant on August 16, 2005, at the request of respondent. He also had a telephone interview with her on September 13, 2005, concerning an additional job she had not disclosed at the first interview. Based on these conversations,

he developed a list of 45 unduplicated tasks that claimant performed in the 15 years before her work-related accident.

In an attempt to verify the information from claimant, Mr. Zumalt sent his task list to respondent and at least two other of claimant's former employers. He was only able to get information concerning claimant's tasks from respondent. Mr. Zumalt took the information received from respondent and prepared a supplemental task list containing the respondent's version of claimant's tasks.

Mr. Zumalt computed claimant's wage loss by using claimant's preinjury AWW of \$658.29, which excluded the value of her fringe benefits with respondent. At the time he made this computation, claimant was working at NCH Truck Service earning \$8 per hour with no benefits. His report indicates that she worked 42.5 hours per week. He computed her wage loss as 47 percent.

Dan Boyd is a private investigator hired by respondent to conduct surveillance on claimant. He conducted this surveillance in May, June, and July 2005. On May 3, 2005, Mr. Boyd followed claimant as she and her son were delivering newspapers, and he videotaped her as she was driving up and down the streets and getting out of the vehicle and throwing newspapers. There were other times he observed her but was unable to videotape her. He testified he observed her throwing papers repeatedly, which would seem to violate the restrictions given by Dr. Fluter.

Mr. Boyd prepared a written report but did not have it with him at the deposition. He does not remember the exact days in May that he performed surveillance on claimant. He conducted surveillance for eight days between May and July. The number of hours per day he performed surveillance varied. He could not remember the number of hours he performed surveillance on claimant. He billed by the hour but did not recall how many hours he billed. The videotape is about one and one-half minutes long and shows claimant pulling her truck to a curb, getting out, walking to a sidewalk, tossing a newspaper, getting back in the truck, and moving the truck forward a few feet.

The Board agrees with and affirms the ALJ's finding of a 9 percent functional impairment. This figure takes into consideration the similar diagnoses of Drs. Fluter and Mills and represents an average of their ratings. Furthermore, the Board concludes that claimant's impairment is directly attributable to her work-related accident. Once this conclusion is reached, there is little dispute concerning the ALJ's findings of claimant's post-accident lack of a good faith job search, wage earning ability, and wage loss, both actual and imputed.

As for the question of claimant's task loss, the ALJ found it to be 36 percent. Although not a strict mathematical average of all opinions, this percentage represented a compromise, both as to the various task lists and the various restrictions and resulting task loss opinions of the physicians. It also approximates an average of the highest task loss

opinion given by Dr. Fluter utilizing the task list prepared by Mr. Hardin and the lowest task loss opinion given by Dr. Melhorn using the supplemental task list prepared by Mr. Zumult. The Board agrees with the result reached by the ALJ and affirms his decision in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated January 30, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant
Larry D. Shoaf, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director